Supreme Court, U.S.
FILED
04-512 OCT 14 2004
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No.

IN THE

Supreme Court of the United States

CONRAD KROUSE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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October 14, 2004

QUESTION PRESENTED

1. Whether the recent amendment to 18 U.S.C. § 924(c) making is a crime, carrying a mandatory consecutive sentence, requires evidence of something more than the mere coincidence of the commission of a passive, constructive possession drug crime and the passive constructive possession of a firearm in order to prove the "in furtherance" element?

Table of Contents

Question Presented . . . . . *i*

Table of Authorities . . . . . *iii-iv*

Opinion Below 2

Jurisdiction 2

Statutes and Constitutional Provisions Involved 2

How the Federal Questions Were Raised and Decided Below 3-4

Summary of Argument 4-7

Argument 8-19

THE EVIDENCE WAS INSUFFICIENT TO APPLY 18 U.S.C. § 924(C) BASED ON THE LOCATION OF THE GUNS SEIZED, AND PETITIONER'S CONVICTION AND 120 MONTH CONSECUTIVE SENTENCE THEREON SHOULD BE REVERSED 8-19

Conclusion 20

Table of Authorities

Cases: **Pages**:

Jackson v. *Virginia*,
443 U.S. 307 (1979) 8

Muscarello v. United States,
324 U.S. 125 (1998) 9

United States v. Avery,
295 F.3d 1158 (10th Cir. 2002) 11, 19

United States v. Bailey,
516 U.S. 137 (1995) 9

United States v. Basham,
268 F.3d 1199, 1207 (10th Cir. 2001) 12, 19

United States v. Ceballos-Torres,
218 F.3d 409 (5th Cir. 2000) 10, 11, 12, 14

United States v. Iiland,
254 F.3d 1264, 1270 (10th Cir. 2001) 11

United States v. Lawrence,
308 F.3d 623, 630 (6th Cir. 2002) 11

United States v. Lomax,
293 F.3d 701 (4th Cir. 2002) 10, 11

Table of Authorities

Cases: **Pages**:

United States v. Lott,
298 F.3d 969, 986 (10th Cir. 2002) 19

United States v. Luciano,
329 F.3d 1 (1st Cir. 2003) 10

United States v. Mackey,
265 F.3d 457 (6th Cir. 2001) 11

United States v. Timmons,
283 F.3d 1246, 1253 (11th Cir. 2002) 11, 12

United States v. Wahl,
290 F.3d 370 (D.C. Cir. 2002) 10, 13

Statutes:

18 U.S.C.

Section 924, subdivision (c) 1, 2, 4, 7, 9

Section 924, subdivision (c) (1) 11

Section 924, subdivision (c) (1)(A) . . 8, 9, 10, 13, 19

28 U.S.C.

Section 1254(1) 2

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Petitioner, CONRAD KROUSE, respectfully prays that a writ of certiorari issue to review the decision of a panel of the Ninth Circuit Court of Appeals, affirming his conviction of possessing a firearm in the commission of a drug offense.[1]

[1] Appellant was convicted in a jury trial of possession of marijuana with intent to distribute and of possession of a firearm in furtherance of that drug offense, pursuant to a recent amendment to 18 U.S.C. § 924(c). His sentence was increased by 120 months based on the Section 924(c) conviction.

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit appears in the official reports at 370 F.3d 965. The opinion was originally filed on June 4, 2004. On July 16, 2004 the Circuit Court denied Petitioner's Petition for Rehearing. The opinion of the Court of Appeals affirming the convictions, as well as the Order denying rehearing and rehearing *en banc*, are reproduced in the Appendix.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sec. 1254(1). The judgment of the district court was rendered on August 22, 2002. The Opinion of the circuit court was filed on June 4, 2004. A petition for rehearing and suggestion for rehearing *en banc* was timely filed, and the order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* was filed on July 16, 2004. Under Rule 13.1 of the Rules of this Court, this Petition is timely filed.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the interpretation of an amendment to Title 18 U.S.C. § 924(c) which creates a new offense. The statute is set out in the Appendix.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal question presented on this Petition was raised in the direct appeal from judgment of conviction and addressed by the circuit court affirming Petitioner's conviction. The opinion of the Court of Appeals sets out the evidence adequately to frame the federal constitutional issues presented, although it draws inferences from the evidence in terms that predetermine its interpretation of the statute.

In its opinion, the circuit court purports to adopt a different interpretation of the new statute, and rejects the "test" for evaluating the sufficiency of evidence to uphold a jury verdict on this offense, but essentially holds that a firearm is "possessed" "in furtherance" of a passive drug offense, whenever a person who possesses a drug for the purpose of distribution also possesses a listed firearm. Certiorari is necessary in this case because even though the "test" adopted by the Ninth Circuit allows a conviction where all that is proven is the contemporaneous passive possession of the listed drug and the passive possession of the firearm, the opinion below states that the mere existence of those two elements is not sufficient.

Rather, the court states there must be proof of an intent to possess the firearm for the purpose of furthering the drug offense, but it sets forth no reasoned criteria for evaluating when that has been proven. In addition, there is a conflict among the various circuits on the proper interpretation and approach to applying this new statute.

On appeal Petitioner alleged that his conviction for possession of a firearm in furtherance of possession of marijuana with intent to distribute must be reversed because in this case the drug offense was passive possession - not the sale or transportation of the drug, and Petitioner was not present at the time of the possession, proven at trial. The only evidence that the guns, also found in the room where some of the drugs were found, were in fact possessed "in furtherance" of the drug possession, was an assumption that they were based on their proximity to the drugs, and the fact that some of the guns were loaded.

Ironically, the Court of Appeal purported to be in a position to divine that some guns found in the house *were* possessed "in furtherance" of the drug offense, while others were not. (Please see Opinion, Appendix p. 8) ["We also note that other firearms, which Krouse apparently kept for purposes unrelated to his drug business, including a shotgun in his bedroom closet and a collectable rifle, were stored elsewhere throughout his home." 370 F.3d at pp. 968-969].

SUMMARY OF ARGUMENT

The published opinion below purports to establish a standard to evaluate the sufficiency of the evidence in a case under the recently enacted amendment to 18 U.S.C. §924(c), which now criminalizes possession of a firearm "in furtherance of" a drug offense, by requiring a "nexus" between the drugs and the firearm, but in fact the opinion fails to establish any standards at all for determining what must be proved, and what is legally insufficient to establish such a "nexus."

Certiorari should be granted to hold that where, as here, the drug offense in question is the passive crime of "possession" in a house by a defendant who is not present at the time of the possession, the passive possession of firearms cannot constitute the required "nexus" merely because the firearms may be loaded or near the drugs when they are found.

The operative element of the offense – "in furtherance of" – becomes mere surplusage if all the government must prove is that the defendant had a firearm in the same place in his home where he also illegally possessed marijuana or other drugs.

The opinion below first substitutes proof of a "nexus" for the requirement written into the statute by congress – possession *in furtherance of* – and then concludes that a jury can find any loaded firearm passively possessed in the same place as the passively possessed drugs are found, has such a "nexus" to the drugs and based on *that* return a verdict or finding that the gun was possessed "in furtherance of."

The opinion *says*, but does not consistently apply, the words: "Evidence that a defendant merely possessed a firearm at a drug trafficking crime scene, without proof that the weapon furthered an independent drug trafficking offense, is insufficient to support a conviction."

Without addressing the argument that a passive crime like possession of marijuana for the purpose of (later) distribution is categorically *different* from other "drug trafficking scenes" – where, for example, the gun is found in a car or at a meeting point where drugs are being driven to a sale or being exchanged – the published opinion then goes on to say:

> "We hold that sufficient evidence supports a conviction under § 924(c) when facts in evidence reveal a nexus between the guns discovered and the underlying offense."

The Opinion then goes on to conclude that here such a "nexus" is shown because "the firearms, plus ammunition, were 'strategically located' within easy reach in a room containing a substantial quantity of drug trafficking paraphernalia" (citing out of circuit authority using a "close proximity" test.)

The fundamental conceptual problem with this holding is that as used by the Opinion, "nexus" is really nothing more than "proximity." In other words, while paying lip service to the idea that Congress required an intent to further the drug crime, and *saying* that mere proximity is insufficient, the Court holds that a nexus (which in Latin means nothing more than a "bond or a link") is a perfectly acceptable substitute for proof of the intent element found in the words of Congress.

Just as the record here reveals nothing about the intent with which the firearms in the room where drugs were found were possessed, it also fails to support the pure speculation contained in the opinion about other firearms in the house. The opinion states in that respect:

> "We also note that other firearms, which Krouse apparently kept for purposes unrelated to his drug business, including a shotgun in his bedroom closet and a collectable rifle, were stored elsewhere throughout his home."

It is just as much speculation to conclude the purpose for which Appellant possessed those firearms as it was speculation to conclude the purpose for which he possessed the others, and the only evidence which distinguished the guns in the room with the drugs and the other guns in the house was the place or location of the ones in that room.

Appellant urges this Court to grant Certiorari to establish that using a legal term that means bond or link (i.e., "nexus") is not a satisfactory substitute for requiring actual evidence of the purpose for which a firearm is possessed, and further that Congress did not intend to impose a mandatory ten year consecutive sentence enhancement merely because a person who passively possesses drugs in a room with the intent to distribute them at some later time, also has near those drugs a loaded firearm. In this case the only "link" between the firearms and the drugs in the home office was the fact that they were both in that place, which is exactly the "proximity test" the circuit court opinion purports to reject.

Certiorari should be granted to establish a meaningful test for when the evidence is sufficient to prove the intent element of possession in furtherance of a drug offense under the newly amended Section 924(c), rather than the meaningless test found in the published opinion below.

ARGUMENT

This court should resolve the conflict in the circuits regarding the proper approach to reviewing a § 924(c) (1)(A) conviction for possessing a firearm "in furtherance of" a passive drug offense.

THE EVIDENCE WAS INSUFFICIENT TO APPLY 18 U.S.C. § 924(C) BASED ON THE LOCATION OF THE GUNS SEIZED, AND PETITIONER'S CONVICTION AND 120 MONTH CONSECUTIVE SENTENCE THEREON SHOULD BE REVERSED

A conviction is tested under the substantial evidence test, and must be reversed absent substantial evidence of each essential element of the crime charged. (*Jackson* v. *Virginia*, 443 U.S. 307, 317, n. 10, 61 L.Ed.2d 560, 99 S.Ct. 2781, 2788 n. 10 (1979)

Searching agents and police officers found seven firearms in Petitioner's home on June 24, 2001, the same day they seized 67 kilograms of marijuana and 86 grams of cocaine. Petitioner was not at home. In addition, some of the firearms were either loaded or found with loaded magazines and, in a separate location, over 100 rounds of various types of ammunition were also located. The guns in the bedroom were found in the dresser. With the exception of one small baggie of marijuana, no drugs were found in the dresser, but cocaine was found in the desk in the same room, a box of marijuana was found in the room, and much more marijuana was found in the garage of the residence. Scales and baggies were also found in the dresser.

While the Government fielded an "expert" who told the jury that the guns *could* be used for protection in connection with drug sales, and that the amount of ammunition was "quite common" with the number of firearms and the drug business, there was no evidence or proof to satisfy the statutorily required connection between possession of the specified firearms and the drug conviction. Cf., *United States v. Bailey*, 516 U.S. 137 (1995) ("*Bailey*").

Section 924(c) proscribes not only the "use" of a firearm, but under recent amendments also prohibits and punishes an offender who "carries" or "possesses" such a firearm "in furtherance of" the specified drug offense. (18 U.S.C. § 924(c)(1)(A).)

Petitioner's conviction and sentence here cannot be upheld as "use" or "carrying" because he neither actively employed any gun, nor did he "carry" (i.e., move, transport, or bring to a drug offense) any such firearm.

In *Bailey*, this Court held that the mere presence of a specified firearm does not satisfy the requirement of Section 924(c) when the defendant is charged with the "use" of a firearm in a specified drug offense. Rather, *Bailey* teaches, to prove such "use" requires evidence of "active employment" by the defendant to further the drug offense.

Similarly, in *Muscarello v. United States*, 324 U.S. 125 (1998), the Court held that to be guilty of carrying a firearm "during and in relation to" such a crime, the evidence need only show that the drug dealer carried a firearm in his vehicle while transporting drugs for distribution. Obviously, the facts here do not constitute "carrying" any firearm "during or in relation to"

a drug offense.

Finally, the phrase "in the furtherance of" is specifically applied in the statute to "who possesses" and *it* has been held to preclude a conviction where the two acts of possession of drugs for distribution and possession of the firearms only happen to take place at the same place and time. Prior to this case, there was no published Ninth Circuit opinion construing Section 924(c)(1)(A) subsequent to the 1998 amendment adding the crime of "possession" of a firearm "in furtherance of" a specified drug offense. It appears that virtually every other circuit has already weighed in on the meaning and application of this language. The 1st, 4th, 6th, 10th 11th and District of Columbia Circuits have all addressed the question, however.

Each of these circuits have ruled that the mere presence of a firearm at the scene of a drug trafficking crime is insufficient to convict. See e.g., *United States v. Wahl,* 290 F.3d 370, 375 (D.C. Cir. 2002) ["the mere presence of a firearm at the scene of drug trafficking is insufficient to support a conviction under section 924(c)(1)"] and *United States v. Ceballos-Torres,* 218 F.3d 409, 415 (5th Cir. 2000) [proof a gun was possessed "in furtherance of" a drug offense "inherently requires more than 'mere presence' of the firearm at the scene" of a drug offense.] .

In *United States v. Luciano*, 329 F.3d 1, 6 (1st Cir. 2003) the conviction for possession "in furtherance of" was upheld in light of the "close proximity" of the guns to over $200,000 worth of heroin and in light of expert testimony that guns are possessed to protect drugs against raids by rival gangs, but the Court cited *United States v. Ceballos-Torres, supra*, 218 F.3d 409, 415 with approval. Similarly, in *United States v. Lomax*,

293 F.3d 701 (4th Cir. 2002) the Court also cited *Ceballos-Torres,* 218 F.3d at 413 with approval, but upheld the defendant's conviction because he carried a loaded firearm to the scene of a drug deal. In *United States v. Lawrence*, 308 F.3d 623, 630 (6th Cir. 2002) the Court said:

> "The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular mandatory sentence. Rather, the government must illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity." (quoting Legislative History)

And, in *United States v. Avery*, 295 F.3d 1158 (10th Cir. 2002), while affirming a conviction based on circumstantial evidence the guns were used to promote or facilitate drug deals, the Tenth Circuit agreed with other courts that "[g]enerally speaking, the government must demonstrate that the defendant's firearm possession 'furthered, promoted or advanced his illegal drug activity.'" *Id.*, at p. 1180. (Citing *United States v. Iiland,* 254 F.3d 1264, 1270 (10th Cir. 2001).) See also *See United States v. Timmons,* 283 F.3d 1246, 1253 (11th Cir. 2002) (explaining that a conviction for possession of a firearm in furtherance of a drug trafficking crime "requires that the prosecution establish that the firearm helped, furthered, promoted, or advanced the drug trafficking") (*Id.*, at p. 1252), where the Eleventh Circuit held that the "in furtherance" requirement of § 924(c)(1) "mandate[s] that the government prove more than the mere presence of a gun during a drug trafficking crime. (Citing *United States v. Mackey,* 265 F.3d 457, 461 (6th Cir. 2001) (explaining that the firearm "must promote or facilitate the crime"); *Ceballos-Torres,* 218 F.3d at

415 (explaining that the defendant's possession must "further [ ], advance[ ], or help[ ] forward the drug trafficking offense"). Put another way, courts have explained, "[b]y requiring that the possession be 'in furtherance of' the crime, Congress intended a specific nexus between the gun and the crime charged." *Mackey*, 265 F.3d at 462. *See also Timmons*, 283 F.3d at 1253 (same) and *United States v. Basham*, 268 F.3d 1199, 1207 (10th Cir. 2001) (explaining that there must be a "direct connection between the firearm and the drug offense").

In the present case, the evidence raised a mere possibility that at some future time the guns could have been used to protect the drugs or Petitioner during a drug transaction, but there was no proof that was their purpose, nor that they actually "furthered, advanced, or helped forward the drug trafficking offense" of which Petitioner was actually convicted – the possession of the drugs in his home.

It should be noted that while some of the guns were loaded, and certainly ammunition was available, the guns were not strategically placed by the entrance to Petitioner's home, nor were they physically in the same location as the drugs, and there was a large quantity of drugs in the garage where no guns of any kind were located. Moreover, these guns were all together, thrown into a drawer, not set around the house or even around the bedroom for easy access.

While Petitioner acknowledges that the evidence raised the bare possibility that the guns were possessed for the purpose of some possible future eventuality in some future potential drug sale (that was not charged or shown by any evidence), the evidence did *not* show the guns were possessed "in furtherance of" the drug crime of which Petitioner was convicted.

Since the evidence showed merely the coincidence of gun possession and drug possession (for distribution) by the same person at the same general location, the evidence was insufficient as a matter of law to sustain Petitioner's conviction on Count 2 which, along with the 120 month sentence, must be reversed.

The Circuit Court upheld the 18 U.S.C. Section 924(c)(1)(A) finding must be upheld claiming that a rational finder of fact could have concluded the connection between the firearms and the drug conviction met the statutory test. Contrary to that conclusion, here that was no evidence that "the firearm . . . helped, furthered, promoted or advanced the drug trafficking crime." (See *United States v. Wahl, supra*, 290 F.3d 370, 375.

The opinion below also points out as significant the fact that some drugs were in the same room of the house as firearms. No cases in any other circuit holds, however, that merely being in the same room is sufficient, where, as here, there is no other evidence to establish the purpose for which the guns were in that room, and where, as here, there is no ready proximity to the drugs on an occasion of a drug transaction.

Obviously, if a person takes a gun in the front seat of a car carrying either money or drugs on the way to a drug buy, *that* circumstantial evidence [i.e., the ready accessibility of the gun, and the timing of its possession vis. the scheduled drug buy] is sufficient for a rational fact-finder to conclude the firearm "helped, furthered, promoted or advanced" the drug crime.

Not so here. There was no scheduled drug transaction. Rather, the drugs were possessed in a static manner, and found during a search of the residence where Petitioner was staying. There is no comparable evidence that: (1) A drug transaction was scheduled in the room where the firearms were found; or even (2) that Petitioner [or anyone] *ever* conducted drug transactions in that room, or in any place in which the firearms were "readily accessible."

Even using some of the tests adopted by other circuits, the evidence here is insufficient. Under the factors set out in *United States v. Ceballos-Torres*, *supra,* 218 F.3d 409, for example, as setting forth "factors useful in determining [if] the required nexus between the firearm and the drug selling operation exists", the nexus does not exist.

The Type of Drug Activity Being Conducted

There was no "activity" other than the passive constructive "possession" of drugs in the office (a bedroom) and the garage. No drug sales were scheduled or underway, and no drug purchase was shown in the evidence. Moreover, Petitioner was not in physical possession of *either* the drugs or the firearm. He was one of the residents of a home in which both were found.

Clearly, this passive constructive possession does not favor a finding of the possession of a firearm which "helped, furthered, promoted or advanced the drug trafficking crime."

The Accessibility of the Firearm

At the time of its seizure by the searching agents, it was *not accessible* to Petitioner, since he was not in the room where

the guns or the drugs were located. Moreover, the firearms were not out and handy, but were in three separate dresser drawers.

In the top drawer, which did not contain a large cache of drugs but only contained what was most likely marijuana for personal use (a one ounce baggie), there was a loaded .38 caliber gun, and a magazine for that gun, which many homeowners keep for protection.

In the next drawer there were no drugs, but there was a loaded .38 Derringer. This gun, which is designed to be concealed on one's person, was not possessed by Petitioner at the time it was found; it was tucked away in his drawer. *Had* a drug transaction been scheduled, and *had* Petitioner hidden the gun on his person, the "accessibility" of this Derringer might meet a test for a firearm which "helped, furthered, promoted or advanced the drug trafficking crime."

In the bottom drawer there were three more firearms. Two were not loaded, and a third was a loaded Colt .45 semi-automatic. Again, there were no drugs in this drawer.

Obviously, Petitioner *could* have entered that room and armed himself with one or more of those guns, but there is no evidence that he possessed them to promote, etc. any drug crime. The crime of possession of the drugs found elsewhere in that room and in the garage did not depend on the presence of the guns to be complete or to succeed. It is a passive crime, and it is complete without regard to the guns.

It is apparent that the Government is here relying on something that might have happened in the future if another, different drug crime had been proven – a purchase and/or a sale

of drugs. While the perpetrators of one of those crimes might have loaded the guns and armed themselves with them to promote or further such crimes, that is not what the evidence shows happened in this case. There was no purchase or sale, and Petitioner was no where near the guns when they were found in his residence, nor was he in physical proximity to any of the guns. None of them were "accessible to him" at the moment of the crime of possession that was proven, and no drug sale was contemplated or being carried out.

The Type of Firearm

One .38 caliber handguns, one .45 semi-automatic handgun, a Derringer, a .357 magnum, and a shotgun were found. Petitioner does not believe this criteria is even useful in determining whether any such firearm is possessed to "help, further, promote or advance the drug trafficking crime." Petitioner assumes that the primary motive for including this factor is to make it possible for a purported "expert" police witness to testify that certain types of firearms are frequently (or always) possessed to promote drug transactions. For example, an expert testified in this case that drug dealers frequently possess firearms to promote or further their crimes. But there is no evidence that a person who is in possession of a large quantity of non-contraband (such as Petitioner)[2] might not keep such guns for his own protection, in general, or to guard against potential theft of his other valuables. Moreover, even the so-called "expert" testimony in this case was that drug dealers will often "arm themselves." But here Petitioner did not "arm himself" because the guns were merely in the office, not in his physical possession.

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[2] The trial evidence showed that in the "office" room where these guns were found there was also found in the dresser, boxes full of watches and CD's.

Whether the Firearm Is Stolen

No evidence that *any* of the firearms here were stolen was offered, and presumably this fact favors a non-nexus conclusion.

The Status of the Possession

There was no claim that Petitioner could not legally possess a firearm, although one of the firearms, a shotgun, was alleged to be too short. Again, this factor seems to be included as favoring a finding of a nexus. Petitioner cannot discern any logic behind the notion that a firearm which is illegally possessed is more likely to be possessed for purposes which meet the statutory test than a legally possessed firearm. Moreover, the "status" of possession is far more likely to turn on factors that are unrelated to any alleged or assumed "nexus" between the drug offense and the gun. For example, if a felon is in possession of a gun, that possession is of an illegal status, but that hardly bears on whether or not it is possessed to promote a drug trafficking crime. Nor would the same possession of the same gun by a non-felon be less likely to be possessed to promote a drug trafficking offense in which he or she is engaging.

Whether the Firearm Is Loaded

As noted, three of the five firearms here *were* loaded, but since they were not immediately accessible to Petitioner, and since they were only constructively possessed by him and there was no scheduled drug transaction, this fact hardly proved the guns were there to promote, etc. the passive drug trafficking offense of possession of the drugs.

Proximity of the Firearms to the Drugs or Drug Profits

Again, the guns were in the dresser in the office. Cocaine was in a desk drawer in the same room, marijuana was in boxes on the floor of the room and in the garage of the house. Proximity is clearly an ambiguous factor when it is true (as here) that other items of value, such as those Petitioner sold on the internet, are also present.

The Time and Circumstances Under Which the Firearm Is Found.

Petitioner believes this factor may be the most significant in this case since the "time" and "circumstances" show that these guns were simply being stored in the dresser – not that they were possessed in anticipation of their use in any active drug trafficking crime. There were two pounds of marijuana in the garage and no guns were kept there so, presumably, there was no plan to have the guns at the ready to protect the drugs. Moreover, there is no evidence that any drug buyers were on their way to the house to buy drugs, or that the drugs and (any of the) guns were being packed up to be taken to a drug sale.

Petitioner submits that the Circuit Court's interpretation of the evidence in this case makes the mere, passive possession of firearms a very serious federal crime[3] based on the mere coincidence of the constructive passive possession of guns and drugs.[4]

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[3] Carrying a mandatory consecutive ten year sentence.

[4] Ironically, Petitioner was also convicted for the passive constructive possession of the shotgun, based on its length.

Nor is this a case like *United States v. Lott*, 298 F.3d 969, 986 (10th Cir. 2002), where a conviction was upheld based on a firearm which was within the defendant's physical reach on the driver's seat of a car, or *United States v. Avery, supra,* 295 F.3d 1158, 1180-1181, where a shotgun was found in a bedroom where other evidence established that drugs sales were conducted in that bedroom.

Finally, this Court is urged *not* to adopt the expansive definition of possessed "in furtherance of" a drug trafficking crime used in many of the cases that have been decided by the circuit courts. This view would have this Court interpret the new section 924(c)(1)(A) as increasing the mandatory sentence of any person in possession of drugs for the purpose of distribution by ten years, if he or she also is in possession of any firearm in the same residence, because some rational jury could conclude that the firearm was "kept available for use if needed during a drug transaction." (Cf., *United States v. Basham, supra,* 268 F.3d 1199, 1206-08.)

While this may be a permissible inference in a drug sales situation, it creates a presumption of guilt, shifting the burden to the defendant to prove he had the firearm in his residence for some other purpose, where, as here, the alleged drug trafficking crime is possession with the intent to distribute. Moreover, the phrase "carries or possesses" appears to be designed to include the case of a defendant who has a gun on his person during a drug transaction, as well as the defendant who constructively possesses a gun in a car or in an immediately accessible place at the time of a drug transaction, but not to make the mere presence of a gun in a closed drawer in the same room in which drugs, possessed with the intention of later selling or distributing them, into a second ten year mandatory minimum offense.

Conclusion

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the Court of Appeals affirming Petitioner's conviction.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 14th day of October, 2004.

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APPENDIX

370 F.3d 965

United States Court of Appeals,
Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Conrad Albert KROUSE, III, Defendant-Appellant.

No. 02-50458.

Argued and Submitted March 30, 2004.
Filed June 4, 2004.

Background: Defendant was convicted, in the United States District Court for the Central District of California, Alicemarie H. Stotler, J., of, inter alia, possession of firearm in furtherance of drug trafficking crime, and he appealed.

Holding: The Court of Appeals, Tallman, Circuit Judge, held that evidence supported conviction.

Affirmed.

***965** William J. Kopeny, Irvine, CA, for the defendant-appellant.

Todd T. Tristan, Assistant United States Attorney, Santa Ana, CA, for the plaintiff-appellee.

Appeal from the United States District Court for the Central District of California; Alicemarie H. Stotler, District Judge, Presiding.

*966 Before: GOODWIN, PREGERSON, and TALLMAN, Circuit Judges.

TALLMAN, Circuit Judge:

For the first time in this circuit, we must decide what it means to possess a firearm "in furtherance of" a drug trafficking offense under 18 U.S.C. § 924(c)(1)(A). In so doing, we affirm the conviction and 161-month sentence of Conrad Albert Krouse.[1] We conclude that sufficient evidence supports Krouse's conviction for possession of a firearm "in furtherance" of a drug trafficking crime under § 924(c) because the facts in evidence demonstrate a sufficient nexus between the weapons discovered in Krouse's home and his drug trafficking operation.

I

This case began with an investigation into the disappearance of various arcade and vending machines from a tavern in Buena Park, California. Suspecting that Krouse had stolen the machines, local police officers executed a search warrant on his home. They discovered the missing machines plus five firearms, ammunition, 86.5 grams of cocaine, and almost 150 pounds of marijuana.

Krouse was ultimately indicted on five federal weapons and drug charges, including one count of possession of firearms in furtherance of a drug trafficking offense. *See* 18 U.S.C. § 924(c). At trial, Krouse claimed that the drugs and weapons discovered in his home belonged to two associates

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[1] Krouse raised other issues on appeal, which we address in a memorandum disposition filed contemporaneously with this opinion.

known as "Rhythm" and "Poetry." Krouse testified that the pair had commandeered his home office where most of the contraband was discovered. His story proved unconvincing. Krouse was convicted after trial by jury on four of five counts and sentenced to 161 months in prison.[2] His appeal was timely.

II

We are asked to interpret 18 U.S.C. § 924(c), which criminalizes possession of a firearm "in furtherance of" a drug trafficking or violent crime. Krouse contends that insufficient evidence supports his conviction under this statute. We disagree.

18 U.S.C. § 924(c)(1)(A) provides in relevant part:

> [A]ny person who ... in furtherance of any ... crime [of violence or drug trafficking offense] possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime ... be sentenced to a term of imprisonment of not less than 5 years.

We focus on the narrow question of whether the firearms discovered in Krouse's home "further[ed]" his drug

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[2] Krouse was convicted for possession of an unregistered firearm, in violation of 26 U.S.C. § 5861(d) (count one); possession of firearms in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (count two); possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1) (count three); and possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). The district court dismissed a second count of possession with intent to distribute marijuana, in violation of 21 U.S.C. § 841(a)(1) (count five), because the jury could not reach a verdict on this charge. This appeal concerns Krouse's conviction on count two.

trafficking operation.[3]

***967** To "further" means "to help forward ... promote [or] advance." MERRIAM-WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002). As used in § 924(c), the House Judiciary Committee intended that "[t]he government must clearly show that a firearm was possessed to advance or promote the commission of the underlying offense." H.R.Rep. No. 105-344 (1997), 1997 WL 668339, at *12 ("House Report").

Evidence that a defendant merely possessed a firearm at a drug trafficking crime scene, without proof that the weapon furthered an independent drug trafficking offense, is insufficient to support a conviction under § 924(c). *See United States v. Lawrence,* 308 F.3d 623, 629-31 (6th Cir.2002) (distinguishing firearms possessed "in furtherance of" drug trafficking from another unused firearm discovered at the same crime scene); *United States v. Wahl,* 290 F.3d 370, 375 (D.C.Cir.2002) ("[T]he mere presence of a firearm at the scene of drug trafficking is insufficient to support a conviction under section 924(c)(1)."); *United States v. Ceballos-Torres,* 218 F.3d 409, 414-15 (5th Cir.2000) (same); House Report at * 12 ("The mere presence of a firearm in an area where a criminal act occurs is not a sufficient basis for imposing this particular mandatory sentence."). Congress indicated that supplementing evidence

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[3] There is no dispute that sufficient evidence supports the jury's conclusion that Krouse "possessed" the firearms discovered in his home. *See United States v. Lott,* 310 F.3d 1231, 1247 (10th Cir.2002) ("Possession under § 924(c)(1) can be shown through either constructive or actual possession.").

of mere possession with expert testimony that drug traffickers often carry firearms in the course of doing business presents a borderline case under § 924(c). *See* House Report at * 12; *see also United States v. Iiland,* 254 F.3d 1264, 1274 (10th Cir.2001) ("The fact that drug dealers in general often carry guns for protection is insufficient to show possession in furtherance of drug activity in [this] particular case.").

A conviction for possession of a firearm "in furtherance of" a drug trafficking offense or crime of violence under § 924(c) requires proof that the defendant possessed the weapon to promote or facilitate the underlying crime. *See United States v. Lomax,* 293 F.3d 701, 705 (4th Cir.2002) ("[Section] 924(c) requires the government to present evidence indicating that the possession of a firearm furthered, advanced, or helped forward, a drug trafficking crime."); *United States v. Mackey,* 265 F.3d 457, 461 (6th Cir.2001) ("[Under § 924(c),] the weapon must promote or facilitate the crime."); House Report at *12 ("[T]he government must illustrate through specific facts, which tie the defendant to the firearm, that the firearm was possessed to advance or promote the criminal activity"). In other words, this element of § 924(c) turns on the intent of the defendant. *See United States v. Basham,* 268 F.3d 1199, 1208 (10th Cir.2001).

When an appellant challenges the sufficiency of evidence supporting his conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). In *Ceballos-Torres,* the Fifth Circuit suggested that consideration of the following factors "might"

help answer this question: the type of drug activity involved, the accessibility of the firearm, the type of weapon, whether the weapon is stolen, whether the defendant legally possessed the weapon, whether it is loaded, the proximity of the weapon to the drugs, and the time and circumstances under which the gun is found. 218 F.3d at 415. These factors inevitably evolved into an eight-part "test." *See, e.g., United States v. Suarez,* 313 F.3d 1287, 1292 (11th Cir.2002). Such tests may not aid the analysis in all cases.

***968** Although the *Ceballos-Torres* factors may help distinguish a lawfully-owned wall-mounted antique from a firearm possessed to further drug trafficking or a crime of violence, *see* 218 F.3d at 415, the Fifth Circuit's guidance is less helpful in closer, and more common, cases. When a handgun is discovered in the trunk of a drug dealer's car, or under his pillow, or in a gun safe, the *Ceballos-Torres* factors do not help distinguish possession for the promotion of drug trafficking from possession for other, perhaps legitimate, purposes. Nor do we believe that loaded or unregistered firearms are particularly indicative of drug trafficking or crimes of violence. When deciding whether sufficient evidence supports a conviction under § 924(c), we will not resort to a checklist that has little relation to the crime charged.

We hold that sufficient evidence supports a conviction under § 924(c) when facts in evidence reveal a nexus between the guns discovered and the underlying offense. *See United States v. Luciano,* 329 F.3d 1, 6 (1st Cir.2003) (affirming a conviction under § 924(c) because the evidence established "a sufficient nexus" between firearms and drug trafficking activity); *Mackey,* 265 F.3d at 462 ("[W]e emphasize that the

possession of a firearm on the same premises as a drug transaction would not, without a showing of a connection between the two, sustain a § 924(c) conviction."); *United States v. Finley*, 245 F.3d 199, 203 (2d Cir.2001) ("[T]he requirement in § 924(c)(1) that the gun be possessed in furtherance of a drug crime may be satisfied by a showing of some nexus between the firearm and the drug selling operation."); House Report at *12 ("The Committee believes that one way to clearly satisfy the 'in furtherance of' test would be additional witness testimony connecting [the defendant] more specifically with the firearm.").

III

We affirm Krouse's conviction under § 924(c) here because ample evidence establishes the nexus between the firearms discovered in his home office and the drug trafficking operation discovered in the same room. No less than five high caliber firearms, plus ammunition, were strategically located within easy reach in a room containing a substantial quantity of drugs and drug trafficking paraphernalia.[4] *See Luciano*, 329 F.3d at 6 (finding that guns discovered in "close proximity ... to [a] significant stockpile of heroin" established a "nexus" between the weapons and drug trafficking activity); *Lawrence*, 308 F.3d at 630 ("The jury's verdict ... is supported by the close proximity of the weapons to the drugs and the fact that these weapons were

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[4] The weapons were discovered in a dresser in Krouse's home office. Police found a Colt .45 caliber semi-automatic handgun, a .38 caliber Derringer, and an Interarms .380 caliber handgun--all of which were fully-loaded. Police also discovered a short-barrel .410 gauge shotgun with shells and an unloaded Colt Python .357 magnum revolver. Additional ammunition was also recovered.

found either loaded or with ammunition."); *Basham,* 268 F.3d at 1208 ("[A] firearm that is kept available for use if needed during a drug transaction is 'possessed in furtherance of' drug trafficking [.]"); *Mackey,* 265 F.3d at 462 ("[T]he firearm must be strategically located so that it is quickly and easily available for use."); *cf. Iiland,* 254 F.3d at 1274 (reversing a conviction under § 924(c) because "[t]here was no evidence that the gun and drugs were ever kept in the same place or that[the defendant] ever kept the gun accessible while conducting drug transactions."). We also note that other ***969** firearms, which Krouse apparently kept for purposes unrelated to his drug business, including a shotgun in his bedroom closet and a collectable rifle, were stored elsewhere throughout his home. When this evidence is viewed in the light most favorable to the successful prosecution, a jury could conclude that Krouse possessed the weapons discovered in his home office in furtherance of his drug trafficking operation.

Krouse's conviction under § 924(c) is **AFFIRMED.**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA No. 02-50458
DC No. CR-01-00225-AHS(A)
Central Dist., California

UNITED STATES OF AMERICA,
Plaintiff and Appellee,

v.

CONRAD ALBERT KROUSE,
Defendant and Appellant.

ORDER

Before: GOODWIN, PREGERSON and TALLMAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

FILED
JUL. 16, 2004
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES CODE
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 44--FIREARMS
§ 924. Penalties

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, the person shall be sentenced to a term of imprisonment of not less than

10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or

the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.